

No. 48693-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**John Pritchard Jr.,**

Appellant.

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Clark County Superior Court Cause No. 15-1-01644-0

The Honorable Judge Gregory Gonzales

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Pritchard's suppression motion.
2. The police violated Mr. Pritchard's Fourth and Fourteenth Amendment right to be free from unreasonable seizures by seizing him in the absence of a reasonable suspicion.
3. The officer invaded Mr. Pritchard's right to privacy under Wash. Const. art. I, § 7 by seizing him in the absence of a reasonable suspicion.
4. The trial court erred by entering Conclusion of Law No. 3 pursuant to CrR 3.6. CP 51.
5. The trial court erred by entering Conclusion of Law No. 4 pursuant to CrR 3.6. CP 51.
6. The trial court erred by entering Conclusion of Law No. 5 pursuant to CrR 3.6. CP 51.
7. The trial court erred by entering Conclusion of Law No. 6 pursuant to CrR 3.6. CP 51.
8. The trial court erred by entering Conclusion of Law No. 8 pursuant to CrR 3.6. CP 52.

**ISSUE 1:** An investigatory stop is unlawful unless supported by specific, articulable facts creating the reasonable belief that the suspect is breaking the law. Did police improperly seize Mr. Pritchard in the absence of reasonable suspicion?

9. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 5:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Pritchard is indigent, as noted in the Order of Indigency?

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

John Pritchard was having car trouble. RP 7. The front end of the car shook as he drove. He pulled over to check the tires, but saw nothing wrong. RP 9, 13-14. He drove further, but the car continued to shake so he pulled over again and activated his flashers. RP 7, 16. He got out to look at the front tires. RP 9, 16. Some parts of the road were blocked because the area was undergoing construction. RP 15. It was the middle of the night. RP 23.

Mr. Pritchard didn't realize it, but a police officer had seen him pull over twice. RP 13-14, 16. The officer, Sgt. Wilson, pulled in behind Mr. Pritchard and asked him if everything was OK. RP 8, 17. Mr. Pritchard told him he thought he could have a flat front tire, and they both looked and saw no problem. RP 17, 18, 26.

Officer Wilson asked Mr. Pritchard if he had a driver's license, and Mr. Pritchard gave him his license. RP 7, 19-20; CP 50. At that point, Mr. Pritchard felt obligated to stay. RP 8.

While still holding Mr. Pritchard's identification, Officer Wilson then asked Mr. Pritchard "if he thought his license was good." RP 18; CP 50. Mr. Pritchard said he thought it was, but seemed "very unsure." RP 18; CP 50. When asked if it might be suspended, he told the officer it might be because he was behind on child support. RP 18, 21; CP 50.

Officer Wilson retained the license, turned on his radio, read the information over the radio, and waited for a response. CP 50.<sup>1</sup> He learned that Mr. Pritchard's license was suspended. RP 22. Even so, Wilson did not plan to make an arrest. RP 22. When Mr. Pritchard went to ask his passenger if she could drive the car, the officer saw on the floorboards a bag containing what he thought might be methamphetamine. RP 23. Wilson arrested Mr. Pritchard. RP 24.

The state charged Mr. Pritchard with possession of methamphetamine. CP 1. Pritchard moved to suppress the evidence as stemming from an unlawful seizure. CP 2-22. The court held a hearing under CrR 3.6. The trial judge ruled that the initial contact was justified by the officer's duty of community caretaking, that taking the identification was not a seizure, that the drugs were in plain view, and that the arrest was based on probable cause. RP 37-44; CP 49-52.

The case went to trial, and the jury convicted Mr. Pritchard. RP 68-77. At sentencing, Mr. Pritchard told the court that he was an unemployed veteran who did not have any job skills. RP 265. The court did not find that he had the ability to pay legal financial obligations. CP 70.

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<sup>1</sup> Mr. Pritchard recalled that Wilson turned and took a few steps away from him to make the call. RP 8. Wilson testified that he was still standing in front of Mr. Pritchard during the radio check. RP 20.

Mr. Pritchard timely appealed, and the court signed an order of indigency. CP 78, 79.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED BY ADMITTING ILLEGALLY OBTAINED EVIDENCE.**

Officer Wilson lacked reasonable suspicion when he asked Mr. Pritchard for his license. Nor did he have a basis to retain Mr. Pritchard's license while asking questions about his driving status. Because the initial seizure was unlawful, all evidence must be suppressed.

#### **A. Standard of review**

Appellate courts review *de novo* the constitutionality of a warrantless seizure. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

#### **B. Officer Wilson unlawfully seized Mr. Pritchard in the absence of a reasonable suspicion of criminal activity.**

The federal and state constitutions both protect against unlawful seizure of persons. U.S. Const. Amends. IV, XIV; Wash. Const. art. I, § 7; *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011). Unlike the Fourth Amendment, the analysis under art. I, § 7 “focuses on the rights of the individual rather than on the reasonableness of the government action.” *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008).

Warrantless seizures are *per se* unreasonable. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). The state bears the burden of proving that a warrantless seizure falls into one of the “jealously and carefully drawn” exceptions to the warrant requirement. *Id.* The exclusionary rule requires suppression of all evidence obtained pursuant to a person’s unlawful seizure. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).<sup>2</sup>

An investigatory stop must be justified by suspicion of criminal activity that is well-founded, reasonable, and based on specific and articulable facts. *Doughty*, 170 Wn.2d at 62. A seizure occurs whenever an officer restrains a person’s freedom of movement such that “a reasonable person would not feel free to leave or to decline the officer's request and terminate the encounter.” *State v. Fuentes*, 183 Wn.2d 149, 158 n. 7, 352 P.3d 152 (2015).

Asking a person for his or her driver’s license amounts to a seizure. *State v. Penfield*, 106 Wn. App. 157, 163, 22 P.3d 293 (2001). Such a seizure must be supported by reasonable suspicion. *Id.*

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<sup>2</sup> Certain exceptions recognized under the federal constitution do not apply under art. I, § 7. *See, e.g.* *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (inevitable discovery exception); *State v. Afana*, 169 Wn.2d 169, 181, 233 P.3d 879 (2010) (good faith exception).



Here, Officer Wilson seized Mr. Pritchard by asking for his license. CP 50. Under the circumstances, a reasonable person would not have felt free to leave. *Penfield*, 106 Wn. App. at 163.

Wilson did not have a well-founded and reasonable suspicion that Mr. Pritchard was engaged in criminal activity. *Doughty*, 170 Wn.2d at 62. The request came after Wilson learned that Mr. Pritchard had pulled to the side of the road because his “car was shimmying and doing things of that nature.” CP 50. At the time of the request, Officer Wilson had no reason to think that Mr. Pritchard’s license was suspended, or that he was engaged in any other kind of criminal activity. RP 7-8, 18-22; CP 50.

Furthermore, Office Wilson continued to unlawfully detain Mr. Pritchard by posing at least two questions while continuing to hold the license. RP 7-8, 18-22; CP 50. Wilson retained the license and asked Mr. Pritchard if it was “good,” and then if it might be suspended. RP 18, 21; CP 50.

The initial seizure was unlawful. In the absence of reasonable suspicion, Officer Wilson had no basis to ask Mr. Pritchard for his license, or to retain it while questioning him about his driving status. *Penfield*, 106 Wn. App. at 163. This unconstitutional seizure tainted all that followed under the “fruit of the poisonous tree” doctrine. *State v. VanNess*, 186 Wn. App. 148, 154, 344 P.3d 713 (2015).

Mr. Pritchard's conviction must be reversed. *Penfield*, 106 Wn. App. at 163. The evidence must be suppressed and the charge dismissed with prejudice. *Id.*

**II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.**

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).<sup>3</sup>

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Mr. Pritchard is unemployed and lacks any job skills. RP 265. The trial court did not find that he had the present or future ability to pay legal financial obligations, and determined that he is indigent for purposes

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<sup>3</sup> Division III does not appear to have addressed the *Sinclair* approach to appellate costs.

of this appeal. CP 70, 79. There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

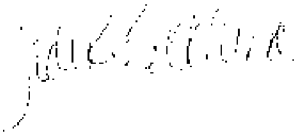
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

### **CONCLUSION**

For the foregoing reasons, Mr. Pritchard's conviction must be reversed, the evidence suppressed, and the charge dismissed with prejudice. If the state substantially prevails on review, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on July 26, 2016,

### **BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

John Pritchard  
11909 NE 189th St.  
Battleground, WA 98604

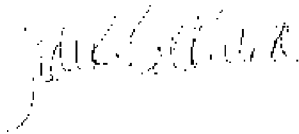
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 26, 2016.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

## BACKLUND & MISTRY

**July 26, 2016 - 1:08 PM**

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Notice of Appeal/Notice of Discretionary Review

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Signing Judge: \_\_\_\_\_

Motion To Seek Review at Public Expense

Order of Indigency

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